by those intended to be restrained?" The case is doubtful on principle and authority.

J. R. Jr.

THE ACTION FOR LOSS OF SERVICES AND THE MEASURE OF DAMAGES TO BE APPLIED.—If a servant is injured by a third party, the result being that his service to his master is interrupted, the master has an action "*per quod servitium amisit*" even though the third party did not thereby intend to injure the master.[1] The master's right of action was originally based on his right to the services by virtue of the relation of master and servant and not his right as contractor to enjoy the benefit of the performance of a contract which bound the servant to render such service. This right seems to be a relic of the time when the family was the important legal unit, the rights of which were centered in and enforced and vindicated by its head, the father. His right to recover for an injury to his son or daughter was based on the injury to him in the form of loss of service and the flimsiest evidence of service, or even of the right thereto, was held to be sufficient to establish this injury.[2] In other words the relation of master and servant had to exist.

In the earlier cases the servant was always a son, a daughter, a wife, or a domestic servant, apprentice, or a laborer within the terms of the Statute of Laborers,[3] each of whom after all was at least a member of the master's immediate, trade or business family. In 1795, Chief Justice Eyre nonsuited a plaintiff who alleged that an opera singer employed by him had been assaulted by the defendant whereby the plaintiff lost his services, observing that "if the present action could be supported, every man, whose servant, whether domestic or not, was kept away a day from his business, could maintain an action."[4] In an early South Carolina case, the court restricted the right to the case of domestic servants, refusing to permit recovery for injury to a farm laborer who worked on shares,[5] and though this case was disapproved later on another ground,[6] it may be pointed out that not only were farm laborers originally villeins attached to the soil, but that they were the very class to which the Statute of Laborers was particularly applicable.

As has been stated above the right of action is derived from the relation of master and servant and in no wise depends upon interference with the contract of employment. Indeed it is the

[1]Robert Mary's Case, 9 Coke 111b (Eng. 1613); Ames v. Union Railway Co., 117 Mass. 541, 19 Am. Rep. 426 (1875).

[2]Jones v. Brown, 1 Esp. 217 (Eng. 1794); Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584 (1872).

[3]"Statute of Labourers," 23 Edw. III.

[4]Taylor v. Neri, 1 Esp. 386 (Eng. 1795).

[5]Burgess v. Carpenter, 2 S. C. 7, 16 Am. Rep. 643 (1870).

[6]Daniel v. Swearengen, 6 S. C. 297, 24 Am. Rep. 471 (1875); Huff v. Watkins, 15 S. C. 82, 40 Am. Rep. 680 (1880).

almost uniform trend of current authority that one entitled to a benefit from the performance of a contract cannot recover from one whose acts deprive him of its benefits,[7] or put him to undue expense in its performance,[8] because the injury is too remote, except, of course, in the case of intentional interference with contracts,[9] where the problem is one of an intentional tort rather than negligence.[10] Therefore, there being no liability for negligently causing the impairment of a contract, the basis of the action for loss of services cannot rest upon the interference with the contract of employment between master and servant, but must be incidental to and arise out of the relation of master and servant itself. The question is then presented whether the right of action shall be limited to the relation of master and servant as it existed when the right of action originated, or whether it shall be extended to embrace the relation of employer and employee in all its modern developments.

There are several early instances of the extension of the action to cases where the relation was rather that of employer and employee than that of master and servant in its historic sense. In New York a merchant whose clerk was unlawfully imprisoned recovered damages for loss of services;[11] while in England the action was held to lie in a case where a "servant and traveller," probably a species of commercial traveller, was injured while on the plaintiff's business, through the negligence of the defendant.[12] A recent English case,[13] however, goes much farther and allows

[7]Anthony v. Slaid, 11 Metc. 290 (Mass. 1846); Brink vs. Wabash Railway Co., 160 Mo. 87, 60 S. W. 1058 (1900); La Societe v. Bennetts, (1911) 1 K. B. 243; Dale v. Grant, 34 N. J. L. 142 (1870); and the same is held in accident and life insurance cases where there is no subrogation, Conn. Mut. Life Ins. Co. v. N. Y. and New Haven Railway Co., 25 Conn. 265, 65 Am. Dec. 571 (1856); Gatzweiler v. Milwaukee Elect. Railway & Light Co., 136 Wis. 34, 116 N. W. 633 (1908).

[8]Cattle v. Stockton Co., (1875) 10 Q. B. 453.

[9]Lumley v. Gye, 2 E. & B. 216 (Eng. 1853); Bowen v. Hall (1881) 6 Q. B. 333; Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817 (1907) Tubular Rivet Co. v. Exeter Boat Co., 159 Fed. 824 (1908).

[10]An interesting variation of this rule is evidenced by a recent strike case, Dail-Overland Co. v. Willys Overland Inc. et al. 263 Fed. 171 (1919), in which the strike was enjoined because it prevented the employer's performance of his contract with the petitioner. The reasoning of the Court is that since one has a right of action against another who induces a breach of contract, so has he against one who forces a breach. The authorities cited for this rule are all cases in which there has been an intentional injury to the plaintiff through his contract relation; but in this case the strike was not directed against the petitioner. The Court overlooks the fact that the fundamental element of this type of action is here lacking, namely the intent to injure the petitioner through his contract. If the proposition here laid down were followed to its logical conclusion the result would be at least alarming, for if the first contractor has a right to an injunction, why not one contracting with him and so on. The same rule was laid down in the similar case of Carroll v. Chesapeake & Ohio Coal Agency Co., 124 Fed. 305 (1903).

[11]Woodward v. Washburn, 3 Denio 369 (N. Y. 1846).

[12]Martinez v. Gerber, 3 Man. & G. 88 (Eng. 1841).

[13]Brafford Corporation v. Webster, (1920) 2 K. B. D. 135.

recovery for loss of services where the relation of employer and employee bears little or no resemblance to the trade or business family of the original cause of action. In this case the right of amunicipal corporation to recover for the loss of the services of one of its policemen injured while on duty through the negligence of the defendant was recognized by the court and was not questioned by the counsel for the defendant. The paternalistic feature of the historical relation of master and servant is here totally lacking, for the employer is an impersonal entity, a municipal corporation. In short it would be difficult to find an example of the relation of employer and employee farther removed from the relation of master and servant under which the right of action originated, and it would seem that upon the authority of this case there is no modern instance of the relation of employer and employee to which the right of action might not be extended.

The extension of the right of recovery for loss of service to the relation of employer and employee in its most modern aspects may or may not be a step in the right direction. The principles upon which the measure of damages is based in the policeman case are, however, fundamentally unsound. The damages were assessed in two items, first: the amount of full wages the plaintiff corporation was forced to pay under the contract of employment while the policeman was thought to be temporarily incapacitated; and secondly: the amount of pension the plaintiff corporation was bound by statute to pay the policeman from the time he was found to be permanently incapacitated. The first item of damages represents the loss suffered by the plaintiff corporation because the defendant has interfered with the contract of employment, and arises squarely out of the contract itself. But for such an interference through negligence there is no cause of action and there can be no recovery. It should, therefore, have no bearing upon the damages to be granted in a cause of action of an origin entirely distinct from the contract of employment. The gist of the action is the loss of services and the measure of damages universally laid down consists in the general value of such services in that line of employment, plus the cost of replacing the servant,[14] not the value of the particular servant to his master,[15] nor the amount the master may be forced to expend because of some other relation between himself and his servant. In this connection it is interesting to note a *dictum* of Lord Sumner of the House of Lords in dealing with an action for loss of services, where a voluntary pension had been paid. "The damages must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract."[16]

[14]Hays v. Borders, 6 Ill. 46 (1844); Kelley v. Mayberry Township, 154 Pa. 440, 26 Atl. 595 (1893); Sawyer v. Sauer, 10 Kan. 519 (1873).

[15]Cain v. Vollmer, 19 Idaho 163, 112 Pac. 686, 32 L. R. A. N. S. 38, note (1910).

[16]Admiralty Commissioners v. S. S. Amerika, (1917) 1 App. Cases 38, 61. This language is *obiter dictum* because it was held there could be no recovery for the death of an employee upon the authority of Baker v. Bolton, 1 Camp. 493 (Eng. 1808).

The second item of damages fails equally to fall within the generally accepted measure of damages. The obligation of paying a pension is placed upon the employer by operation of a statute and is analogous to the burden placed upon an employer to pay compensation to his injured employees by operation of the usual State Workman Compensation Acts. Under the New Jersey Employer's Liability Act,[17] which gives no right of subrogation, it has been held that compensation paid an injured employee could not be included in the damages granted in an action for loss of services.[18] It is submitted that this principle is correct and should have been applied in the policeman case, for it is the expressed intention of this class of statute that the employer shall bear the burden of the employee's incapacity.

The policeman case is, therefore, interesting in that it takes for granted that there is a right of action for loss of services in a case of employer and employee where there is not a shadow of the original trade or business family under which the action grew up, but is of doubtful soundness in its radical departure from the proper measure of damages.

G. R. R. Jr. and F. H. B. Jr.

THE PRIVILEGED CHARACTER OF ANTI-MARITAL TESTIMONY. —"It hath been resolved by the justices, that a wife cannot be produced either against or for her husband, *qua sunt duae animae in carne una.*"[1] Although the husband's privilege of not having his wife testify against him had been recognized previously,[2] this seems to have been the first authoritative statement of it. The true reason for the rule, however, is probably that suggested in Wigmore's Evidence,[3] namely, that the wife's act of testifying against her husband, especially in criminal cases, where she might be the means of sending him to his death, would be, in effect, but one step from the crime of petit treason. This offence was still recognized at the time the rule arose, and consisted of violence to the head of the household by a member of it, whether, wife, child or servant. But since this reason was not enunciated in any decision, Lord Coke's rather metaphysical explanation was in favor for a time. Since then, however, as has been the case with many other rules of evidence, the courts, from time to time, have not hesitated to invent new and different reasons for supporting the privilege, so as to make it fit into their respective schemes of legal philosophy. With a very few exceptions they have united in believing the rule to be a good one, and have justified and enforced

[17]Employer's Liability Act of New Jersey, Chapter 95, Laws, Session of 1911.

[18]Interstate Tel. & Tel. Co. v. Public Service Elect Co., 86 N. J. L. 26, 90 Atl. 1062 (1914).

[1]Coke on Littleton, 6b, (1628).

[2]Bent v. Allot, Cary 94 (Eng. 1580).

[3]§ 2227.